

Josten Concrete Products Co., Inc. and Allied Industrial Workers of America, AFL-CIO, a/w International Union of Allied Industrial Workers of America, AFL-CIO. Case 18-CA-10976

May 24, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On February 25, 1991, Administrative Law Judge Hubert E. Lott issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 5 of the judge's decision.

"5. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally granting wage increases and changing health insurance carriers and benefits without affording the Union an opportunity to bargain over these matters, and by dealing directly with unit employees and bypassing the Union over the changes in the insurance benefits and carrier."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Josten Concrete Products Co., Inc., Mitchell and Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall amend the Conclusions of Law to conform to the judge's findings, which are accurately reflected in his recommended Order and notice.

David M. Biggar, Esq., for the General Counsel.

John Burke, Esq., of Sioux Falls, South Dakota, for the Respondent.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was heard at Sioux Falls, South Dakota, on October 11,

1989,¹ on unfair labor practice charges filed by Allied Industrial Workers of America, AFL-CIO, a/w International Union of Allied Industrial Workers of America, AFL-CIO (the Union), on August 2 against Josten Concrete Products Co., Inc. (Respondent), and on a complaint issued by the General Counsel on September 11.

The issues in the case are whether or not Respondent unilaterally granted wage increases to bargaining unit employees without giving the Union an opportunity to bargain over such increases, and whether or not Respondent bypassed the Union and dealt directly with unit employees over changes in health insurance coverage and carrier; and unilaterally changed the insurance carrier and coverage without affording the Union an opportunity to bargain over these changes in violation of Section 8(a)(1) and (5) of the Act.

Respondent's answer to the complaint, duly filed, denies the commission of any unfair labor practices.

The parties were afforded an opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of hearing briefs have been received from the parties.

On the entire record and based on my observation of the witnesses, and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a South Dakota corporation, with offices and places of business in Sioux Falls and Mitchell, South Dakota, has been engaged in the manufacture and wholesale distribution of concrete products. During the calendar year ending December 31, 1988, the Company, in the course and conduct of its business, purchased and received at its South Dakota facilities goods and materials valued in excess of \$50,000 directly from points outside the State of South Dakota. During the same period the Company sold and shipped from its South Dakota facilities products and materials valued in excess of \$50,000 directly to points outside the State of South Dakota. The Company admits, and I find, that it is an employer engaging in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. Background

The Union was certified on July 22, 1986, to represent:

All full-time and regular part-time production and maintenance employees employed by the employer at its Mitchell and Sioux Falls, South Dakota facilities, including truck drivers; excluding office clerical employees, sales employees, managerial employees, guards and supervisors as defined in the Act.

There are 47 employees working for Josten of which 16 are bargaining unit employees.

¹ All dates refer to 1989 unless otherwise indicated.

The Union has represented Respondent's production and maintenance employees since certification on July 22, 1986. The parties' history of collective bargaining up to July 14, 1987, can be found in *Josten Concrete Products Co.*, 295 NLRB 1029, issued July 20, 1989. In that decision the Board affirmed the findings of the administrative law judge who found multiple violations of Section 8(a)(1) and (5) of the Act. After the close of trial on July 14, 1987, the parties held bargaining sessions in August and October 1987. The October 1987 bargaining session ended with the Federal mediator telling the Union that Respondent had not changed its position. The Respondent's wage offer at that time was that all employees would earn \$9 per hour, thus requiring the raising of some employees' wages and lowering others. This offer was never withdrawn. The Respondent's offer on health insurance coverage for unit employees was that the current carrier, Central Life, be continued during the life of the agreement. That the cost to unit employees of the health insurance at the time remain the same during the life of the agreement, and that Respondent would absorb any additional health insurance cost during the life of the agreement. This proposal was never withdrawn by Respondent. To date, no agreement has been reached.

B. Unilateral Wage Increases

On May 8 Respondent's attorney, John Burke, in a letter to the union representative, Stan Frank, advised him that the Company planned to give wage increases to employees Leisinger and Makros, stating that it was consistent with past practice. In a reply letter within a week later, Frank agreed to the wage increases and offered to negotiate a final settlement on wages for the remainder of the unit.

Thereafter Frank learned that other employees also received wage increases. On June 30 Frank sent a letter to Burke protesting the granting of wage increases to other employees without negotiating with the Union. Although Frank did not want the wage increases to other employees canceled, he did accuse Respondent of acting in bad faith by circumventing the Union and again offered to negotiate a wage package. Burke responded in a letter dated July 10, stating that the additional wage increases granted would not have come up in negotiations because they were based on longevity.

Respondent's president, Clarence Josten, testified that he granted wage increases to four additional bargaining unit employees in May, but only because these four employees requested a wage increase. He also testified that no notice was given to the Union and that the Company has no wage increase policy.

Analysis and Conclusions

It seems obvious that Respondent violated the Act by unilaterally granting wage increases to bargaining unit employees without affording the Union an opportunity to bargain over the issue. It also seems equally obvious that the Union did not acquiesce to Respondent's action after the fact.

Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally granting wage increases to bargaining unit employees.

C. Unilateral Changes in Health Insurance

John Burke wrote a letter to Stan Frank dated July 17, wherein he advised Frank that due to substantial increase in insurance premiums, Respondent had to switch insurance carriers. He invited Frank to discuss this matter on July 24, 25, or 26. Frank was to inform Burke when he could meet. On receiving this letter, Frank checked with his bargaining committee members and was informed that Josten had already talked to the employees, informing them that they would be under a new policy with Travelers Insurance Company. They were given the new rates, deductibles, and benefits, and some employees were given a condensed version of Travelers' insurance package. On learning this, Frank wrote to Burke on July 21 informing him that it appeared that the negotiating had already been done—individually.

Clarence Josten testified that the Central Life policy covered all 47 of his employees and that he was notified 4 to 6 weeks prior to the renewal date of August 1 that premiums would be increased \$91.65 per month per employee for July, and \$95.25 per month per employee for August. Later he testified that about 2 weeks after the first notification, he was notified of the August increase and that these increases prompted him to change insurance carriers, but that he had to act fast because of the August 1 deadline. He received bids from three different insurance carriers but selected Travelers insurance plan 2 days before the August 1 deadline. Later he testified that he contracted with Travelers a little over a week before August 1.

He admitted telling the nonunit employees about the Central Life premium increases immediately on learning about them. He also admitted discussing and explaining the Travelers policy only, with unit employees after the July 17 letter had been sent to the Union. Later he testified that these discussions took place at the end of July, before the final decision was made to go with Travelers. He informed unit employees about the rate, deductibles, and benefits, and told them it was a much better deal for everyone than what they had with Central Life. Josten also testified that one of the reasons he waited so long to select Travelers was that he was informed at the last minute by Travelers that in order to get the premiums and benefits quoted, he must include all employees in the coverage.

Under Travelers' coverage there would be no prescription card, as was the case with Central Life. Employees would be reimbursed for prescription drugs. Travelers coverage included a nonnotification \$200 deductible and a \$100 deductible, while Central Life had only a \$250 deductible. Life insurance under Travelers was \$15,000 and premiums were \$186 per month per employee. Central Life carried \$10,000 life insurance and a premium of \$200 per month per employee. Employee contributions would remain the same.

Employee Russ Jacobson testified that Josten gave him all the information on Travelers health insurance on July 20.

Analysis and Conclusions

Respondent takes the position that it offered the Union an opportunity to discuss health insurance prior to the final decision to select Travelers and that the Union refused its offer to negotiate. Respondent further argues that since no changes, except for the better, were made in the coverage, there was no unilateral action or bargaining in bad faith.

Clarence Josten's testimony was so ambiguous and convoluted that it is unclear when he decided to switch insurance carriers. For example, it seems incredible that Josten thought he could get lower premiums from Travelers by excluding the bargaining unit employees from group coverage, and that he was notified at the last minute that all employees must be in the group. No corroborative evidence was offered by Respondent. This is also true with respect to the changes in insurance coverage. All Respondent offered was Josten's conclusionary testimony that it was a better deal. Under the circumstances, Respondent's burden is greater than that. Therefore, I will discredit Josten on all essential dates and insurance coverages.

With that in mind, certain facts are clear. Josten knew 4 to 6 weeks prior to August 1 that he would change insurance carriers or, at minimum, knew something had to be done concerning insurance coverage. That is when he should have notified the Union, not wait until July 17 and offer negotiating dates that occurred after the decision to change carriers had already been made. The crucial date is not when Josten decided to select Travelers, which is very ambiguous, but the date Josten decided that a change was necessary. It is my finding that this decision was made long before the July dates offered for negotiations. Furthermore, I find that the insurance coverage under Travelers may have been better in some respects than Central Life or it may have been worse. Respondent provided no means to compare. Suffice it to say that insurance coverage is a mandatory subject for bargaining and the Union was given no opportunity to bargain over the changes. Finally, it is undisputed that Respondent dealt individually with its employees over the insurance coverage issued. Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing health benefits and carriers without affording the Union an opportunity to bargain and by dealing directly with unit employees and bypassing the Union instead of bargaining in good faith over health insurance coverage.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Allied Industrial Workers of America, AFL-CIO, a/w International Union of Allied Industrial Workers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees employed by the employer at its Mitchell and Sioux Falls, South Dakota facilities, including truck-drivers; excluding office clerical employees, sales employees, managerial employees, and guards and supervisors as defined in the Act, as amended, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, Allied Industrial Workers of America, AFL-CIO, a/w International Union of Allied Industrial Workers of America, AFL-CIO has been the exclusive representative for purposes of collective bargaining of all Respondent's employees employed in the unit described above in paragraph 3.

5. Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally granting wage increases and changing health

insurance carriers and benefits without affording the Union an opportunity to bargain over these matters.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As a remedy, I shall recommend that Respondent be ordered, if requested by the Union, to rescind the unilateral wage increases and changes in health insurance carrier, including the new health insurance policy, and to bargain in good faith over these issues. It is also recommended that Respondent make the employees whole for any losses they may have suffered due to the implementation of the Travelers Insurance Company health plan, if applicable.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Josten Concrete Products Co., Inc., of Sioux Falls and Mitchell, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting unilateral wage increases without notifying and bargaining with the Union.

(b) Bypassing the Union and dealing directly with employees over health insurance matters.

(c) Unilaterally changing health insurance carriers and benefits without notifying and bargaining with the Union.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If requested by the Union, rescind the unilateral wage increases and changes in health insurance carrier and benefits, reinstate the wage rates and insurance policy in effect prior to the changes, and bargain in good faith with the Union over these subjects.

(b) If applicable, make the employees whole for any losses they may have suffered due to the implementation of the Travelers Insurance Company health plan.

(c) Bargain collectively and in good faith with the Union as the exclusive bargaining representative of its employees in the appropriate bargaining unit. The appropriate bargaining unit is:

All full-time and regular part-time production and maintenance employees employed by Josten Concrete Products Co., Inc., at its Mitchell and Sioux Falls, South Dakota facilities, including truck drivers; excluding office clerical employees, sales employees, manage-

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

rial employees, and guards and supervisors as defined in the Act.

(d) Post at its facilities in Sioux Falls and Mitchell, South Dakota, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT in any manner interfere with, restrain, or coerce any of our employees in the exercise of any of the above rights which are protected under the National Labor Relations Act.

WE WILL NOT bypass Allied Industrial Workers of America, AFL-CIO, a/w International Union of Allied Industrial Workers of America, AFL-CIO, the exclusive representative of our employees, and deal directly with the employees concerning health insurance premiums or health insurance carriers or any other mandatory subject of bargaining.

WE WILL NOT unilaterally grant wage increases to unit employees or change the carrier providing health insurance benefits to our employees without giving prior notification to the Union, and, if requested, bargaining about such changes.

WE WILL, if requested by the Union, rescind the unilateral wage increases and change of health insurance carrier and reinstate the wage rates and insurance policy in effect prior to the changes, and, if applicable, WE WILL make our employees whole for any losses they may have suffered due to the implementation of the Travelers Insurance Company health plan.

WE WILL bargain collectively and in good faith with the Union as the exclusive bargaining representative of our employees in the appropriate bargaining unit. The appropriate bargaining unit is:

All full-time and regular part-time production and maintenance employees employed by Josten Concrete Products Co., Inc., at its Mitchell and Sioux Falls, South Dakota facilities, including truck drivers; excluding office clerical employees, sales employees, managerial employees, and guards and supervisors as defined in the Act.

JOSTEN CONCRETE PRODUCTS CO., INC.